Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

M. D. MacRAE, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

JEFF MORRISON, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

APPELLANTS' BRIEF

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

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APPELLANTS' BRIEF

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

JURISDICTION OF THE COURT

The plaintiff, who is the appellee, contends that the District Court had jurisdiction based upon the provisions of Title 28 U.S.C.A. Sec. 1332, subparagraph (a) (2) in that the action is between citizens of a state of the United States and a citizen of a foreign state. The

appellee is a Panamanian corporation, and the appellants are citizens of the States of Oregon and California (Tr. 14).

The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

The appellants contend, as will be pointed out in their Specifications of Error and Argument in this brief, that although the District Court had jurisdiction to hear the action under the foregoing section, that the court was deprived of jurisdiction to enter judgment for the appellee because of the provisions of the Norris-LaGuardia Act, Title 29 U.S.C.A. Secs. 101 et seq., and the National Labor Relations Act as amended by the Labor Management Relations Act, Title 29 U.S.C.A. Secs. 141 et seq.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Court of Appeals to review the judgment of the District Court is based upon Title 28 U.S.C.A. Sec. 1291, it being a final decision of the District Court, a direct review of which may not be had in the Supreme Court under Title 28 U.S.C.A. Sec. 1252.

STATEMENT OF THE CASE

These cases involve the right of the appellee, a Panamanian corporation and owner of a Liberian flag cargo vessel, to recover from the appellants damages on account of the idleness of the vessel during the period of time that it was being picketed by the appellants.

The SS RIVIERA was an American-built Liberty ship, owned by the appellee and operated under the flag of the Republic of Liberia. Between March and August of 1952 the crew members signed Articles aboard the vessel for a period of two years. Under these Articles the crew members made a voyage from Bremen, Germany, to New Orleans, Louisiana, and from New Orleans, Louisiana, to the Orient, and then to the Port of Portland, Oregon, where it arrived on September 3, 1952. The vessel was to receive certain repairs at Portland, Oregon, and was to pick up a cargo of wheat for carriage to India. On September 9, 1952, practically all of the crew members went on strike and demanded their pay and their transportation to their respective ports of engagement (Tr. 472). From that date until October 14, 1952, the former crew members or their friends other than the appellants herein picketed the vessel. From October 14, 1952, until November 26, 1952, members of the Sailors' Union of the Pacific picketed the vessel until enjoined by the District Court on November 26, 1952. From November 28, 1952, until December 8, 1952, members of the Masters, Mates & Pilots Union picketed the vessel, and from December 10, 1952 until December 12, 1952 members of the Seafarers' International Union established a picket line at the vessel.

The picketing was peacful. The employees of the stevedoring and ship repair firms and other shore employees ordered to work on the vessel refused to work while the pickets were present. After removal of the picket lines, those employees resumed their work on the vessel.

The shipowner brought these separate suits as class suits against certain individual members of the unions involved and all members of each union as a class. In its complaint the appellee sought an injunction against the picketing and also sought damages. The District Court allowed temporary injunctions and appeals were taken to this court. The appeals were dismissed on the ground that the injunctions were moot because the vessel has departed. *Benz, et al. v. Compania Naviera Hidalgo,* 205 F. 2d 944. The causes were remanded to the District Court for further proceedings with the following admonition by this court:

> " * * * that what was determined by the Court below in issuing such injunctions is without further force or effect, and cannot be relied upon as res adjudicata, as creating an estoppel, or as the law of the case, all to the end that the issues relating to the claim of damages may be tried by the parties as free from the effects of such injunctions, as if the same had not been issued."

The three cases were tried together in the District Court on the question of damages. The court allowed a decree for damages in favor of the shipowner and against certain individual members of the unions and allowed the judgments to run against the assets of the three unions.

The alleged wrongful conduct for which the District Court awarded damages consisted of the picketing of the appellee's vessel, the SS RIVIERA, while it was docked at the Port of Portland, Oregon, subsequent to October 14, 1952.

The District Court held that the conduct of the appellants in picketing was wrongful and not pursuant to a labor dispute in that it was for an "unlawful purpose", to-wit: to induce the appellee to rehire its former crew members who had been discharged because of their refusal to work. (Findings of Fact XII, Tr. 242, 329, 375) (Conclusions of Law III, Tr. 245, 332, 379).

CONSOLIDATION OF CASES ON APPEAL

The three separate cases involved herein have been consolidated for purposes of appeal (Tr. 3). All three cases were brought for injunctions and damages on account of the picketing of appellee's vessel. Since the cases were decided by the District Court without a jury, the Specifications of Error will run to the Findings of Fact and Conclusions of Law made by the District Court in each case.

Also since the Findings and Conclusions are practically identical, we shall make but one detailed set of Specifications of Error. This will run in the Benz case, No. 14663. We will then indicate the corresponding Finding or Conclusion in the other two cases for which error is specified upon the same ground.

SPECIFICATIONS OF ERROR

1. The court erred in making Finding of Fact No. IX (Tr. 240) in finding that the crew members of the SS RIVIERA "went on strike for the sole purpose of cutting down the term of their service from two years,

the length of service agreed upon in their articles, and to obtain a higher wage rate and other conditions more favorable to them than those agreed upon in said articles", in that the evidence clearly shows that the members of the crew of the SS RIVIERA went on strike on account of their belief that said vessel was unseaworthy and when they ceased to work they demanded their wages which were then due and their transportation to their ports of engagement.

MacRae case Finding of Fact No. IX (Tr. 327).
Morrison case Finding of Fact No. IX (Tr. 373).

2. The court erred in making Finding of Fact No. XII (Tr. 242) in finding that the picketing by the Sailors' Union of the Pacific was intended to prevent the repairing and loading of the SS RIVIERA and was for the sole purpose of compelling the appellee to reemploy the crew members who went on strike and were discharged, at more favorable wage rates and conditions, for the reason that the evidence clearly shows that the Sailors' Union of the Pacific picketed the vessel for the purpose of publicizing its labor dispute with the appellee and to further its economic interest in the trade in which the appellee was engaged, and said picketing by the Sailors' Union of the Pacific was for the purpose of gaining recognition as collective bargaining agent and to secure representation of the seamen to be employed aboard the vessel.

Further in the MacRae case (Finding of Fact No. XII, Tr. 329) and in the Morrison case (Finding of Fact No. XII, Tr. 375) the court further erred in finding that

the picketing by the members of the union was intended to help the Sailors' Union of the Pacific in obtaining its objectives after it had been restrained from picketing, on the ground and for the reason that there is absolutely no evidence to sustain said finding.

And further in the MacRae case (Finding of Fact No. XII, Tr. 329) the court erred in finding that the vessel's officers were not offered membership in Local 90 nor were any of them eligible for membership in Local 90 for the reason that there is no evidence to that effect, but on the contrary the evidence clearly shows that said officers could have joined said union.

3. The court erred in making Finding of Fact No. XIII (Tr. 242) in which the court found that the picketing by the appellants was the "sole and proximate cause of such loss of use" of the vessel, and further in finding that the appellee "was not deprived of the use of the SS RIVIERA by any technical custody of the United States Marshal during said period", for the reason that the loss of the use of the vessel during the period was caused by the independent intervening acts of the longshoremen and shipyard workers in refusing to cross the picket line, and for the further reason that the appellee did not have a crew aboard the vessel except for a few officers, and further for the reason that said vessel was in the custody of the Marshal pursuant to a libel and was not redeemed by the appellee.

MacRae case Finding of Fact No. XIII (Tr. 329).
Morrison case Finding of Fact No. XIII (Tr. 375).

4. The court erred in making Finding of Fact No. XIV (Tr. 243) wherein the court found that there was no labor dispute between the parties or otherwise at the time of the picketing, for the reason that a labor dispute did exist between the parties and between the crew members with respect to wages and working conditions aboard the vessel, and with respect to the recognition of the Sailors' Union of the Pacific as the bargaining agent of the employees aboard the vessel, and with respect to the economic interests of the Sailor's Union of the Pacific in the operation of appellee's vessel.

MacRae case Finding of Fact No. XIV (Tr. 330).
Morrison case Finding of Fact No. XIV (Tr. 376).

5. The court erred in making Finding of Fact No. XVII (Tr. 244) wherein it found that as the proximate result of appellants' picketing the appellee suffered both measurable and immeasurable damages, for the reason that said picketing was not wrongful and further any damages sustained by the appellee in the idleness of its vessel were not proximately caused by the picketing by the appellants, and further that said picketing was pursuant to a labor dispute, and if any damages were sustained as a result thereof, that they are damnum absque injuria.

MacRae case Finding of Fact No. XIX (Tr. 331).
Morrison case Finding of Fact No. XV (Tr. 376).

6. The court erred in making Conclusion of Law No. I (Tr. 244) wherein the court concluded that it had jurisdiction of the subjcet matter of this suit, and further that the appellee had no remedy under the National

Labor Relations Act as amended by the Labor Management Relations Act of 1947, and that the court was not deprived of jurisdiction by such remedy, on the ground and for the reason that the conduct complained of by the appellee consisted of a labor dispute affecting commerce, and that therefore the legality of the conduct is determined by the provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. Furthermore, should said conduct be in violation of said law, the remedies provided in said Act are exclusive.

Also the District Court was deprived of jurisdiction because of the provisions of the Norris-LaGuardia Act which divested the District Court of jurisdiction on account of the existence of a labor dispute.

MacRae case Conclusion of Law No. 1 (Tr. 332).
Morrison case Conclusion of Law No. I (Tr. 379).

7. The court erred in making Conclusion of Law No. III (Tr. 245) wherein the court concluded that the picketing "was for an unlawful purpose" and wherein the court further concluded that there was no labor dispute between the parties or between the union and any members or former members of the crew of the vessel, and further the court erred in concluding that there was no labor dispute within the definition of any federal statute, and that the picketing was not a lawful exercise of the right of free speech.

The court erred in making said conclusions for the reason that said picketing was for a lawful purpose in furtherance of appellants' labor disputes with the appel-

lee, and further that the purpose of said picketing was not unlawful in that it did not seek to require the appellee to do anything that it could not lawfully do.

MacRae case Conclusion of Law No. III (Tr. 332).
Morrison case Conclusion of Law No. III (Tr. 379).

8. The court erred in making Conclusion of Law No. IV (Tr. 245) wherein it concluded that the picketing "was the sole proximate cause" of appellee's damages, and that the failure of the employees of the independent contractors to cross the picket line was not an independent, intervening cause of the damages, for the reason that the appellee's damages were caused by its own failure to release the vessel from the custody of the Marshal, and its own failure to have a crew aboard the vessel during the period of the picketing and claimed damages, and its own failure to require the employees of its independent contractors to perform their contracts aboard the vessel. Also the acts of the employees of the independent contractors in refusing to cross the picket line were independent intervening causes of appellee's damages.

MacRae case Conclusion of Law No. V (Tr. 333).
Morrison case Conclusion of Law No. IV (Tr. 379).

9. The court erred in making Finding of Fact No. III (Tr. 238) and Conclusion of Law No. II (Tr. 244) wherein the court held that the members of the Sailors' Union of the Pacific had "sufficiently identical interests in the subject matter of this suit to constitute a class

subject to suit by service on representatives" and wherein the court concluded that "the court has jurisdiction of the parties" and this "a true class suit", and that the individuals Benz and Williams are representatives of the class for the reason that all members of the Sailors' Union of the Pacific do not sail in the off-shore trade and the trade in which the SS RIVIERA was engaged and thus would not have identical interests in the subject matter of this suit.

MacRae case Finding of Fact No. III (Tr. 332); Conclusion of Law No. II (Tr. 332).
Morrison case Finding of Fact No. III (Tr. 370); Conclusion of Law No. II (Tr. 379).

10. The court erred in making Conclusion of Law No. V (Tr. 245) wherein it was held that the appellee was entitled to judgment not only against the individual members of the Sailors' Union of the Pacific who were served, but also against each member of the Sailors' Union of the Pacific and the Sailors' Union of the Pacific as an entity, and wherein the court held that execution should issue against not only the property of the individuals served, but also against the property of the Sailors' Union of the Pacific, and in holding that the judgment was res adjudicata as to the issues litigated with reference to individual members of the Sailors' Union of the Pacific not served in this suit, for the reason that the appellee is not entitled to have judgment or decree entered in its favor against the appellants, or any of them, for any sum, because the conduct of the appellants in picketing was not wrongful, but on the contrary said conduct was a protected concerted activity

within the meaning of the Labor Management Relations Act, and said picketing was not for an unlawful purpose; and further that if any judgment were to be entered, it should be only against the individuals personally served with process, and should not run against the class consisting of members of the Sailors' Union of the Pacific and the Sailors' Union of the Pacific for the reason that this is not a true class suit, and further that a judgment under the laws of Oregon which the District Court is bound to follow in this case cannot be entered against a voluntary unincorporated association.

MacRae case Conclusion of Law VI (Tr. 333).
Morrison case Conclusion of Law V (Tr. 380).

11. The court erred in entering judgment in favor of appellee (Tr. 246) and in failing to enter judgment in favor of the appellants on the ground and for the reason that the appellee has neither plead nor proven a cause of action against the appellants in that the conduct complained of by the appellee is conduct which is protected under the applicable federal law and is not conduct for an unlawful purpose under either state or federal law.

MacRae case Decree (Tr. 335).
Morrison case Decree (Tr. 381).

12. With respect to the MacRae case only, the court erred in making Conclusion of Law No. IV (Tr. 333) wherein the court concluded that "even though" the picketing was for the purpose of requiring the replacement of the licensed personnel with members of the union, such picketing would not create a labor dispute and would be illegal under both state and federal law,

on the ground and for the reason that the picketing for said purpose constitutes a labor dispute and is within the type of conduct protected under the federal and state law.

SUMMARY OF ARGUMENT

This case came before the District Court as a suit for an injunction and for damages, the District Court's jurisdiction being based upon diversity of citizenship and the amount involved. The District Court awarded damages for conduct consisting only of peaceful picketing, on the ground that the object of the picketing was "an unlawful purpose", and therefore wrongful.

It is the contention of the appellants that since the picketing involved an ocean-going vessel engaged in "commerce", that the matters and things complained of by the appellee are governed by the terms of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. It is further contended by appellants that the Act has preempted the field of regulation or restraint of picketing, and has established an exclusive body of rules with respect to picketing. And finally, that under the Act the right to carry on the conduct involved herein was guaranteed and was not specifically prohibited.

The appellants submit, therefore, that since under the federal law the picketing by them was legal, the court below erred in awarding damages on account of the picketing.

In the alternative, appellants also contend that should it be found that the picketing complained of was not a matter governed by the federal law but governed by the state law, nevertheless the picketing was pursuant to a "labor dispute" and said picketing was a valid exercise of the right of free speech, and not conducted for "an unlawful purpose", and therefore the damages, if any, that the appellee sustained on account of the picketing were damnum absque injuria.

Also, in the alternative, the appellants contend that if it should be found that the picketing by the appellants was in violation of the federal law, being an "unfair labor practice" as defined under the Act, that nevertheless the appellee cannot recover therefor in this action for the reason that the appellee has not pursued the remedy prescribed under the Act, which remedy is exclusive.

The appellants contend that the damages, if any, sustained by the appellee due to the idleness of its vessel were not proximately caused by the picketing, but by independent intervening acts of both the appellee itself and of third parties. Finally it is the contention of appellants that in this suit if judgment is to be entered it should run only to the individual defendants served and not against the union or against its property, for the reason that the District Court in hearing a diversity case must follow the law of the State of Oregon and that under the law of that state a judgment for damages is not allowable against a voluntary unincorporated association.

ARGUMENT

I

THE PICKETING WAS NOT WRONGFUL CONDUCT

The appellee's vessel, the SS RIVIERA, arrived at Portland, Oregon, on September 3, 1952, and on September 9, 1952, practically all of its crew members went on strike and were discharged. From September 9, until October 14, 1952, it is admitted that the picketing of the vessel was by persons other than the appellants (Tr. 18).

It also is not claimed in this case that appellants induced the crew members to go on strike and terminate their articles. The record shows that in another suit known as Civil No. 6661 the appellee sued the Sailors' Union of the Pacific in the District Court of Oregon, contending that it had induced the members of the crew to violate their articles (Tr. 445). The court concluded, however, that the Union did not wrongfully induce the members of the crew to breach their articles and to strike (Tr. 454) and a decree was entered dismissing the suit (Tr. 455).

The present suits seek damages for the period beginning October 14, 1952. The District Court found that the unions and their members have an economic interest in the working conditions and wages of seamen employed aboard vessels engaged in the grain charter trade between the ports of the United States and the

Orient (Tr. 243) and further found that the average wages for the SS RIVIERA crew members amounted to only about one-third of the amount of wages paid seamen represented by the unions while employed aboard United States flag vessels engaged in the same trade between ports of the United States and the Orient (Tr. 243).

It was admitted that the appellee's vessel had carried one cargo of American grain to the Orient and was preparing to carry another (Tr. 16). It was also admitted that during the picketing complained of in this case there were approximately 25 jobs open for seamen on the SS RIVIERA (Tr. 21).

It was also admitted that all of the picketing was conducted in a peaceful manner (Tr. 18).

The court held that the picketing was wrongful because it had for its object the "unlawful purpose" of inducing the appellee to rehire its former members whom the District Court said "had deserted". In order to properly determine the question of whether or not the picketing by the appellants was wrongful, it must first be determined whether the substantive law to be applied shall be state or federal law. Historically the body of the substantive law governing the right to picket developed by state court decisions. In other words, the law that was applied to regulate picketing was the law of the state where the picketing occurred.

The first effective statute governing picketing was the Norris-LaGuardia Act passed in 1932 (47 Stat. 70

et seq., 29 USCA Sec. 101 et seq.). Similar acts were passed in many states, including Oregon (Sec. 102-902 OCLA). These acts deprived the courts of jurisdiction to enter an injunction against picketing in cases "involving and growing out of labor disputes." The body of the case law which developed after the passage of these acts, both in the state and federal courts, centered around the question of whether or not there existed a "labor dispute" within the meaning of the Act.

At the same time another approach was made in order to sustain the right to picket. Remembering that the right to picket was being determined by the substantive law of the state where the picketing occurred, it was contended that the restraint by the state court of picketing was a violation of the federal constitutional right of free speech. The Supreme Court of the United States in a number of cases protected picketing as an exercise of the right of free speech.

Senn v. Tile Layers Protective Union (1937), 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229.

Thornhill v. Alabama (1940), 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093.

Carlson v. California (1940), 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104.

American Federation of Labor v. Swing (1941), 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855.

Bakery and Pastry Drivers and Helpers Local 802 v. Wohl (1942), 315 U.S. 769, 62 S. Ct. 118, 86 L. Ed. 1178.

Cafeteria Employees Union Local 302 v. Angelos (1943), Also called: *Angelos v. Mesevich,* 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58.

In the meantime in order to restrict the right of picketing established both under the Norris-LaGuardia Act and under the free speech doctrine, there was developed the "unlawful purpose doctrine." In other words, it was held in a line of cases that the anti-injunction statute would not bar an injunction against picketing if the objective sought by the picketing was regarded as unlawful.

Peters et al. v. Central Labor Council, 179 Or. 1, 9, 169 P. 2d 870 (1946).

Also it was held that the guarantee of the right of free speech by picketing would not be sustained where the object of the picketing was unlawful.

Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807 (1942).

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684 (1949).

Hughes v. Superior Court of California, 339 U.S. 460, 70 S. Ct. 718 (1950).

The cases that developed concerning picketing were practically all resolved around questions of the existence of a labor dispute, of free speech and lawfulness of purpose of the picketing.

The passage of the Wagner Act (49 Stat. 449, 29 U.S.C.A. Sec. 151 et seq.) in 1935 effected no change upon the existing body of state law because the Wagner Act was limited to employer unfair labor practices. It was not until the passage in 1947 of the Taft-Hartley Amendment (61 Stat. 136, 29 U.S.C.A. Sec. 141 et seq.) that a change was to be made. Until that time it was clear that the state law regulating picketing was applia-

ble to all businesses, whether or not they were engaged in interstate commerce. The passage of the Taft-Hartley Amendments created for the first time federal legislation which laid down substantive rules concerning picketing. Section 7 of the Act (61 Stat. 140, 29 U.S.C.A. Sec. 157) provided as follows:

> "Employees shall have the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." (Set out in full in Appendix D.)

Section 8 of the Act (61 Stat. 140, 29 U.S.C.A. Sec. 158) defined for the first time labor organization unfair labor practices (Appendix E).

Following this legislation the Supreme Court has held in a line of cases (See Appendix A) that by the passage of the Taft-Hartley Amendments Congress thereby pre-empted the field of regulation of picketing and similar conduct, and that thereby the laws of the states, both statutory and court made, were superseded. This principle was made abundantly clear by the following language in *Garner v. Teamsters Union* (1953), 346 U.S. 485, 499, 74 S. Ct. 161, 170; 98 L. Ed. 228:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to

> be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits."

This language was recently approved in *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 75 S. Ct. 480, 484, 99 L. Ed. 386 (1955). In the Weber case the court briefly summarized its earlier holdings on pre-emption.

Coming back again to the facts in this case, it is abundantly clear that the picketing involved commerce, and that therefore the provisions laid down in the Act of 1947 shall govern. It follows that the state law no longer applies, Congress having pre-empted the field. This being so, the legality of the picketing must be determined by the provisions of the federal statute, and not by any test of "unlawful purpose" as laid down in the state decisions.

Section 7 of the Act (Appendix D) provides that employees shall have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The admitted facts in the case at bar, as well as the findings of the court, makes it clear that the picketing by the appellants was in aid of collective bargaining, and was therefore conduct protected by the Act. *International Union v. O'Brien,* 339 U.S. 454, 70 S. Ct. 781 (1950).

The appellee has never contended that the picketing constituted an "unfair labor practice" within the meaning of Section 8 of the Taft-Hartley Act. The appellee has always merely contended that the picketing was for

an "unlawful purpose." Indeed, the appellee could not have contended that the conduct of the appellants in picketing constituted an unfair labor practice and at the same time have sought as it did in this case an injunction in the District Court and damages. This is so because had the picketing constituted an unfair labor practice, the appellee's sole remedy would have been found under the Act by an application to the National Labor Relations Board for a cease and desist order, and the District Court would not have had jurisdiction. *Garner v. Teamsters Union etc., supra.*

The few cases where the Supreme Court has held that action by a state court was not contrary to Section 7 of the Act, have all involved situations where the state law condemned the conduct because the *means* as distinguished from the *objective* were improper. See for example *Allen-Bradley Local etc. v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, (violence by strikers); *National Labor Relations Board v. Fansteel Metallurgical Corporation* (1939), 306 U.S. 240, 59 S. Ct. 490, 83 L. Ed. 627, (a sit-down strike), and *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 69 S. Ct. 516 (quicky strikes).

The Supreme Court allowed the state under its police power to regulate conduct not necessarily connected with conserted labor activity which violated local law.

This naturally follows because of the necessity of the federal Act providing a uniform policy to govern labor disputes affecting commerce. In other words, the Court

has held that the labor policy which governs the *objective* of strikes shall be determined by the federal Act, whereas if the *means* of carrying out the objective consists of unusual conduct, it might be goverened by the state under its own police power. *Allen-Barkley Local etc. v. Wisconsin Employment Relations Board, supra.*

This point is made clear by the following passage from *Cox, Federalism in Labor Law,* 67 Harvard Law Review 1297, 1327 (1954):

> Whatever the proper answer in these doubtful cases, a state ought not to be free to restrict concerted action by employees subject to federal law merely by branding their objective 'unlawful'. The slippery phrase 'unlawful objective' has long confused labor law by obscuring a fundamental distinction. The term covers not only (1) the purpose to induce an employer to engage in unlawful conduct but also (2) bargaining demands which an employer may grant without violating any statute or percept of public policy but which the court regards as beyond the required scope of bargaining or insufficient to justify the injury to the employer's business. Judicial opposition to concerted action in the second category is not based upon employees' goal, therefore, but upon concert of action against the employer as a method of achieving it. Such a rule of decision or an equivalent statute permits the same substantive conditions to be established by other means. The purpose of NLRA Section 7 was to immunize employees against this doctrine."

In the case at bar it was admitted, and the court found, that the picketing was peacful. The means were not in any way contrary to state law. The objective of the picketing in the case at bar was well within the guarantee of the federal Act and not prohibited by it.

Appellants therefore submit that since their concerted activities were conducted by lawful and peaceful means, and for objectives protected under the federal Act, they were therefore privileged and not wrongful. It follows, therefore, that appellants should not be liable for damages for carrying on this conduct.

II

PICKETING FOR "UNLAWFUL PURPOSE"

Although we firmly believe that the instant case should be governed by the federal law, we will in this portion of our brief, point out that should the question of the picketing be held to be governed by local state law, that nevertheless the picketing by the appellants does not fall within the "unlawful purpose doctrine."

It can hardly be denied that since the appellants have an economic interest in the craft, trade and occupation involved in this case, and since there were jobs open aboard the vessel, and since there were admittedly problems of representation and of fixing terms and conditions of employment, that this is a case involving and growing out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. See 47 Stat. 70 et seq., 29 U.S.C.A. Sec. 113 set out in Appendix B, and the Labor Management Relations Act. See Appendix F.

As pointed out above in order to outlaw picketing which would otherwise be an exercise of free speech, or be considered pursuant to a "labor dispute", there has developed in many courts the doctrine that if the picket-

ing is for an "unlawful purpose" that it is wrongful. However, it is interesting to note, as pointed out by the author of the annotation in 29 A.L.R. 2d at 360, that in the federal courts it has been held that under the Norris-LaGuardia Act the objective of the union is immaterial if the statute is otherwise applicable. The annotation states:

> "It was believed that the Norris-LaGuardia Act and similar state laws has eliminated judicial discreation in applying the unlawful purpose doctrine where the union's activities were reasonably related to working conditions, as defined in the statutes, but some of the state courts have been extremely reluctant to give up their right to apply this test.
>
> * * *
>
> "In New Negro Alliance v. Sanitary Grocery Co. (1938) 303 U.S. 552, 82 L. Ed. 1012, 58 S. Ct. 703, rev. 67 App. DC 359, 92 F. 2d 510, upholding the right of a Negro group to picket stores allegedly discriminating against their race, the court said: 'The Act does not concern itself with the background or the motives of the dispute.' "

Other federal cases following the principle set forth in the *New Negro Alliance* case are as follows:

> *Matson Navigation Co. v. SIU* (1951 DC Md.), 100 F. Supp. 730.
> *Wilson & Co. v. Birl* (1939 CA 3), 105 F. 2d 948.
> *Diamond Full-Fashioned Hoisery Co. v. Leader,* (DC Pa. 1937) 20 F. Supp. 467.

The courts applying the unlawful purpose doctrine have recognized that in order for picketing to be declared wrongful in that it is for an unlawful purpose, it must have for its object the requiring of *the employer* to do that which would be a crime or a violation of the law.

This requirement was pointed up clearly in two cases decided on the same day by the Oregon Supreme Court. In the first, *Markham & Callow v. International Woodworkers,* 170 Or. 517, 135 P. 2d 727 (1943), it was held that after another union had been duly certified as collective bargaining agent by the NLRB, picketing for the purpose of inducing the employer to violate the new new collective bargaining agreement was picketing for an unlawful purpose. In the other case, *Stone Logging Co. v. International Woodworkers,* 171 Or. 13, 21; 135 P. 2d 759 (1943), it was held that picketing under practically the same situation but where there was no certification, was not picketing for an unlawful purpose. In so holding the court said:

> "The chief distinction lies in the fact that in the Markham & Callow case the union acting as exclusive bargaining agency for all of the employees and which as such secured the union shop contract had been certifed as the exclusive representative of all of the employees for the purpose of collective bargaining by the National Labor Relations Board pursuant to an election conducted by that board. In the case at bar, on the other hand, the plaintiff comes before the court without the benefit of any certification."

A comparision of these Oregon cases makes it clear that the rule that picketing for "an unlawful purpose" refers to the object of the picketing in inducing an employer to do something which he cannot legally do. In the *Markham & Callow* case, the court declared the picketing to be for an "unlawful purpose" in that it had for its object the inducement of the employer to violate the National Labor Relations Act, whereas in the *Stone Log-*

ging Company case the employer would not have been in violation of the National Labor Relations Act by dealing with the picketing union, when there had been no certification.

In *State v. Dobson,* 195 Or. 533, 245 P. 2d 903 (1952), the court held that the picketing was for an unlawful purpose because it had for its object the inducement of the employer, Tidewater, to enter into a contract with the picketing union at a time when a certification election was pending, and when such conduct on the part of the employer would be unlawful under the Taft-Hartley law.

Also, in *Schwab v. Motion Picture Operators,* 165 Or. 602, 109 P. 2d 600 (1941), the Oregon Supreme Court held that the picketing by the union was for an unlawful purpose in that picketing was not only for a closed shop but also for a closed union, and that it would be unlawful for the employer to enter into such a monopolistic contract. The court said:

> "The only substantial controversy between the parties grows out of the union's demand that the plaintiff join it in its monopolistic aim."

The same distinction has been made by the Supreme Court of the United States, where the cases have made it clear that unlawful purpose refers to the inducement of the employer to do that which is unlawful.

In *Building Service Employees International v. Gazzam,* 339 U.S. 532, 70 S. Ct. 784 (1950), the union picketed an employer who refused to sign a union shop contract with the union. There was a state statute that

an employee should be free from coercion by an employer, not only in his desire to join a union, but also in his freedom to "decline to associate with his fellows." The Washington court enjoined the picketing on the ground that it was to force the employer to violate that state statute. The Supreme Court affirmed the lower court. The *Gazzam* case made it very clear that the illegal object ran to the employer and not to the employee. The court held that it would not have been illegal to picket to induce the employees to join the union, but it would have been illegal to picket to induce the employer to force the employees to join the union.

Other cases to the same effect are:

Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807 (1942). (Inducing of employer to violate state anti-trust law).

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684 (1949). (Inducing the employer to violate the state restraint of trade law).

Hughes v. Superior Court of California, 339, U.S. 460, 70 S. Ct. 718 (1950). (Inducing the employer to violate the state anti-discrimination law).

The principle that the unlawful purpose rule applies only where the object of the picketing requires the employer to do that which it cannot legally do, is clearly enunciated A.L.I. Restatement of Torts, Sections 775, 777 and 794, set out in Appendix C.

We conclude, therefore, that since the employer in this case could have rehired its former crew members,

without violating any law, that even if it were assumed that the sole object of the picketing was to require the rehiring of the crew members, such would not be an "unlawful purpose" within the meaning of the law.

The court below, therefore, should have found that the picketing involved was pursuant to a labor dispute and a valid exercise of the appellants' right of free speech, and that damages, if any, as a result of the picketing were damnum absque injuria. *Starr v. Laundry Union,* 155 Or. 634, 63 P. 2d 1104 (1937); *Wallace v. International Association,* 155 Or. 652, 63 P. 2d 1090 (1937); *Peters v. Central Labor Council,* 179 Or. 1, 169 P. 2d 870 (1946); *Baker Hotel v. Employees Local,* 187 Or. 58, 207 P. 2d 1129 (1949).

Further the District Court should have dismissed appellee's suit which was brought in equity, since its ground for equitable relief has wholly failed, and the court should not have retained the case for damages. *Cumberland Building and Loan Asso. v. Sparks,* (C.C. E.D. Ark. 1900) 106 Fed. 101; 19 Am. Jur., Equity, Sec. 132, p. 132.

III

DAMAGES WERE NOT PROXIMATELY CAUSED BY THE PICKETING

The judgment in this case for damages is based upon the court's conclusion that the "defendants' said picketing was the sole proximate cause of plaintiff's said damages" (Tr. 245). This conclusion was obviously based

on its finding of fact that the employees of stevedoring, ship repair firms and others ordered to work on the SS RIVIERA refused to so work when the pickets were present and the fact that after the picket line was removed the employees of the contractors continued their work (Finding of Fact XVIII, Tr. 242).

It is the contention of appellants that the failure of the employees of the independent contractors to cross the picket line was an independent intervening cause of appellee's damages. Appellants also contend that the custody of the vessel by the U. S. Marshal pursuant to a libel during the period of the picketing was also an independent intervening cause of appellee's damages, and thirdly, appellants contend that the fact that the shipowner did not have a crew aboard its vessel was also an independent cause of appellee's damages.

The general rule with respect to liability where there has been independent intervening cause is stated in 25 C.J.S., Damages, p. 476 as follows:

> "*Act of third person.* Where there has intervened between defendant's act and the injury an independent illegal act of a third person producing the injury, and without which it would not have happened, the latter is held the proximate cause of the loss and defendant is excused; or, as the principle has been expressed, although there may have been an original wrongful act, if it produced injury only through the intervening independent and wrongful acts of others, the author of the former is not liable in damages.
>
> "On the other hand, defendant may be liable where damage results from the intervention of legal

> and innocent acts of third persons, naturally and probably following from his wrongful act."

The acts of the longshoremen and repairmen in refusing to cross the picket line were "intervening independent and *wrongful* acts of others" which relieved the appellants from responsibility for damages sustained by the appellee on account of the idleness of its vessel. The stevedoring and repair companies had the duty under their contracts to work on the vessel, and their "employees ordered to work on the said SS RIVIERA refused to work while said pickets representing the Sailors' Union of the Pacific were present" (Tr. 242). The conduct on the part of the employees was wrongful. A person's duty to perform his work or perform a contract is not suspended by the necessity of crossing a picket line. Judge James Alger Fee in a decision in *Montgomery Ward & Co. v. Northern Pacific Terminal et al,* 32 LRRM 2386, 2411 (1953), in holding various rail and truck operators liable for refusing to transport and deliver goods to Montgomery Ward while there was a picket line at Ward's, said:

> "It is said, one of the principles binding upon all members of the laboring class is that none shall cross a picket line. Such a theory is far too broad and is not even observed by the most idealistic union men themselves. (Citing NLRB v. Rockaway News Supply Co., 197 F. 2d 111). * * *
>
> "The ritualistic recognition of a 'picket line' under all circumstances by common carriers because of union pressure lays the foundation for a general strike and class war. If the court appraises correct-

> ly the public interest and the feeling of the great majority of union men themselves, these developments would not be in accord with our history and would destroy the gain which labor has made. Yet in this very situation were all of the elements necessary to provoke illegally a general strike, which this country, for all its liberality toward labor, has voided as anarchy. The insistence upon the paramount obligation of an employee to some distant union, irrespective of law or morality, is the basis of the Marxian conflict of classes. It has no place in the American way of life."

Moreover, it has been held in at least two cases that an employee did not have a legal right to refuse to cross a picket line, and that the action of his employer in discharging him for refusing to cross the picket line did not constitute an unfair labor practice. *NLRB v. Rockaway News Supply Co.* (CA-2 1952), 197 F. 2d 111, 30 LRRM 2119; *NLRB v. Illinois Bell Telephone Co.* (CA-7 1951), 189 F. 2d 124, 28 LRRM 2097, cert. den. 344 U.S. 885.

The foregoing makes it clear that the conduct of shore employees in refusing to work aboard the vessel was wrongful conduct. Their employers had the legal right to discharge them and to hire others to fulfill their contractual obligations.

The appellee was awarded damages for "loss of earnings and expense of maintaining the SS RIVIERA" during the period of the picketing (Tr. 244). However, during the period of the picketing the vessel was in the custody of the United States Marshal pursuant to a libel filed in the District Court of Oregon (Tr. 19). The ves-

sel was not freed until the payment of the decree under that libel on December 11, 1952 (Tr. 20-Tr. 442).

The rule is well settled that a vessel which is arrested by the Marshal becomes *custodia legis.* In Vol. 4, *Benedict on Admiralty,* 6th Ed., Sec. 622, p. 285, the rule is stated that where a vessel is seized and held under process that the voyage is broken up and the crew is automatically discharged, and there is no further lien for wages or other services to the vessel. See also *Old Point Fish Co. v. Haywood,* (CCA-4 1940) 109 F. 2d 703; *New York Dock Co. v. THE POZNAN* (1927), 274 U.S. 117, 47 S. Ct. 482. We submit, therefore, that the appellee could not have been damaged during the period of the picketing because it did not have the custody of the vessel, for the idleness of which it is claiming damages.

Furthermore, for more than a month prior to the picketing complained of in this case, and at all times during the picketing, the appellee did not have a crew aboard the vessel (Agreed Facts XX, Tr. 21).

Where a party seeks damages for loss of profits or loss of use of its property, it must have been in a position to do business or to use its property and would have been able to have done so but for the acts of the parties causing the loss of the use of the property, 17 C. J., Damages, p. 767, Sec. 96; 15 Am. Jur., Damages, Sec. 40, p. 439.

The appellants submit, therefore, that even if it is assumed that their conduct was wrongful, nevertheless it was not the proximate cause of appellee's damages on account of the idleness of its vessel. The intervening re-

fusal of the shore employees to cross the picket line, together with the appellee's own failure to have a crew aboard the vessel and to redeem it from the custody of the Marshal, were all independent intervening causes of the damages from the idleness of the vessel.

IV

THE CLASS SUIT AND FORM OF DECREE

These suits have not been brought by the appellee against any of the unions as an entity. Federal Rule of Civil Procedure 17 (b) provides that the "capacity to sue or be sued shall be determined by the law of the state in which the District Court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States * * * ". The Notes of the Advisory Committee on Rules with reference to Rule 17 (b) state as follows:

> "This rule follows the existing law as to such associations, as declared in the case last cited above." (United Mine Workers of America v. Coronado Coal Co. (1922) 42 S. Ct. 570, 259 U.S. 344, 66 L. Ed. 975, 27 ALR 762).

The *Coronado Coal Company* case recognized that at common law an unincorporated association could not sue or be sued in its own name, and could only be sued in the name of its members, "and their liability had to be enforced against each member." The same common

law rule applies in the State of Oregon. *Cousins v. Taylor,* 115 Or. 472, 239 Pac. 96 (1925).

Appellee undoubtedly recognizing the foregoing principles, brought the instant cases as a class suits pursuant to Federal Rule of Civil Procedure 23 (a) (1) which allows actions to be brought by representation where the parties are numerous and where one or more of the parties adequately represents the group, and "where the character of the right sought to be enforced for or against the class is joint or common." Service was made upon the agents of the unions in Portland. The court held the service to be sufficient and allowed judgment not only against the particular persons served but also against each member of the union, and further ordered that execution may issue against not only the property of the individuals served but against any property held by the union or for the use and benefit of the union, "whether held in the name of the association or others for the association" (Tr. 246, 335, 381).

The adoption of Rule 23, like the adoption of Rule 17 (b), was not intended to change the substantive law, but merely to afford a procedural device to allow to some extent actions against associations by means of a class suit.

In Vol. 3, *Moore's Federal Practice,* Sec. 23:11, p. 3456, entitled "Effect of Judgments," it is pointed out that it was proposed to the Advisory Committee that it should include in Rule 23 the effect of a judgment in a class suit. The Committee answered this proposal in its Notes as follows:

"The Committee considers it beyond their functions to deal with the question of the effect of judgments on persons who are not parties."

Moore commented that "This was due to the feeling that such matter was one of substance and not one of procedure." The same proposition is stated as follows in the concurring opinion of Justice Johnson in *Montgomery Ward & Co. v. Langer,* 168 F. 2d 182 (CCA-8 1948), as follows:

"Except as to the 72 individuals upon whom service of the summons was made, judgment is sought against each of the other union members on the basis of class representation.

"Whether as a matter of due process such representation could legally be made to constitute the basis for a personal judgment, if authorizing legislation existed, I shall not pause to consider.

"It is sufficient here that no jurisdiction over the person for the purpose of entering such a judgment has heretofore been recognized as existing on the basis of mere class representation. And, of course, Rule 23 (a) is not intended to change previous jurisdictional concepts (see rule 82) but only to enable the procedural device of a class action to be used as well at law as in equity, for any purpose which it can legitimately be made to serve.

"Such an adjudication could probably also be made to serve as a foreclosure of all questions against the members of the union as a group, leaving open only the question in favor of each individual, who might subsequently be sued, and served with summons as a basis for a personal judgment, whether he had participated in, authorized or ratified such wrongful acts as the union was found to have committed."

The concluding paragraph of Justice Johnson's concurring opinion expresses the limit to which a judgment can go in a class suit against members of an unincorporated association. In other words, the judgment is binding only against those defendants who are actually served and not binding against the other members of the class, except insofar as the judgment may be res adjudicata on some of the issues. However, in order to make the judgment binding upon the other members of the class a separate suit must be brought in which it must be shown that the individual had participated in, authorized or ratified the wrongful acts.

The judgments herein, however, have been made binding against the property of the unincorporated unions. It is appellants' contention that since under the substantive law of the State of Oregon a judgment could not be rendered against the union, that therefore under the ruling of *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S. Ct. 819 (1938), a judgment could not be rendered against the unions' property in the Federal Court merely based upon the Federal Rules of Civil Procedure.

APPENDIX A

Pre-Emption Cases Decided in the Supreme Court:

Plankinton v. W.E.R.B., 338 U.S. 953, 70 S. Ct. 491 (1950).

Bethlehem Steel v. N.Y.S.L.R.B., 330 U.S. 767, 67 S. Ct. 1026 (1947).

LaCross Telephone Corp. v. W.E.R.B., 336 U.S. 18, 69 S. Ct. 379 (1949).

International Union v. O'Brien, 339 U.S. 454, 70 S. Ct. 781 (1950).

Amalgamated Asso. v. W.E.R.B., 340 U.S. 383, 71 S. Ct. 359 (1951).

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025.

APPENDIX B

Title 29 U.S.C.A. Section 113. Definitions of Terms and Words Used in Chapter.

When used in sections 101-115 of this title, and for the purposes of such section—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any

association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

APPENDIX C

A. L. I. Restatement of Torts.

Section 775 of the Restatement of Torts provides as follows:

"Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

In comment (a) under Section 775, the following is said:

"The legality of the concerted action depends upon the nature of the conduct and of the object to which the conduct is directed."

In the case at bar it is admitted that the conduct of the plaintiff in picketing the vessel was at all times peaceful. The Restatement defines the "object" of concerted action in Section 777 as follows:

"In this chapter, an 'object' of concerted action by works against an employer is an act required in good faith by them of the employer as the condition of their voluntarily ceasing their concerted action against him."

In Section 794, Restatement of Torts entitled "Object Prohibited by Law" it is stated:

"An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

APPENDIX D

Title 29 U.S.C.A. Section 157.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

APPENDIX E

Title 29 U.S.C.A. Section 158 (b).

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

"(4) to engage in, or to induce or encourage the employees of any mployer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle

or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work; Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of

such employees whom such employer is required to recognize under this subchapter;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affect; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

APPENDIX F

Title 29 U.S.C.A. Sec. 152—Definitions—

"When used in this chapter— * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."